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No. 779.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

WILMER D. REKEWEG, as Guardian of Mitchell D. Onstott, a Minor, and HARVEY H. ONSTOTT,
Petitioners,

v.

FEDERAL MUTUAL INSURANCE COMPANY and J. B. GUTHRIE,
Respondents.

RESPONDENTS' ANSWER BRIEF TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS TO OPINIONS BELOW.

Respondents agree with petitioners' citations appearing in this section.

JURISDICTION.

Respondents must disagree with the petitioners' statement of the three grounds they allege give this Honorable Court jurisdiction to review the judgment. It will be shown in the body of this brief that, contrary to petitioners' point one (1), the real question here involved was

decided directly in **conformity** with applicable Ohio Law. Further, answering point two (2), it will hereinafter be shown that the summary judgment granted by the District Court was granted because there was no genuine issue remaining as to any material fact, and the attempts of petitioners to show otherwise will be demonstrated to be based on matters outside the record. Finally, point three (3) of petitioners' statement of jurisdiction not only fails to state grounds for jurisdiction in this Court, but also improperly implies that the decision of the Court of Appeals was improperly rendered.

QUESTIONS PRESENTED.

Again respondents must express their disapproval concerning petitioners' statement of the questions herein presented. Petitioners' question No. 1:

> "1. Does Ohio Law recognize the Common Law action of fraud and deceit?"

is certainly not one of the issues presented in this case. Up until this time no one has questioned the fact that the Courts of Ohio recognize an action for fraud and deceit. Petitioners, in framing the issue above are either attempting to confuse this Court or are themselves unaware of the issues involved. The question actually presented to the trial court and to the Court of Appeals for the Seventh Circuit had to do with the **requirements** of an action for fraud and deceit based upon silence under Ohio Law. All of the briefs and arguments in the Courts below concerned what facts had to be found to exist to support a cause of action for fraud based upon silence under Ohio Law. That was the question presented, argued, and decided. Nowhere in any of the briefs, arguments or decisions below is there even the slightest question raised *that Ohio does* not recognize the Common Law action of

fraud and deceit. However by stating that this is one of the questions presented, petitioners have set up one of the proverbial strawmen that they can now knock down, using the same as a lever to get into this court, all of the time knowing so well that this "question" was never in dispute and was never decided in the case at bar.

Petitioners' second statement of the questions presented is equally unfounded. Question No. 2 as stated by Petitioners reads as follows:

> "2. Can petitioners, by summary judgment under Rule 56, Federal Rules of Civil Procedure, be deprived of a jury trial where there are unresolved genuine issues of material fact, and where a jury trial has been timely demanded?"

It is elementary to Rule 56 that summary judgment will not, and cannot, be granted if there still remains unresolved a genuine issue of material fact. It has long been these respondents' contention that no genuine issue of material fact was left for decision in this case, and this opinion was substantiated by the District Court's ruling on the Petition to Reconsider when the District Court granted summary judgment. Our position was reaffirmed by the Court of Appeals for the Seventh Circuit when they upheld the District Court. It will be pointed out hereafter that when summary judgment was granted in the District Court no material fact remained unresolved, but, that subsequently, and more particularly for the first time in petitioners' original brief in the Court of Appeals, we find them attempting to state that a certain material fact remained undecided when the Trial Court rendered the summary judgment. In an attempt to show this, these petitioners were forced to go outside the record of this cause, yet, even in so doing they were unable to convince the Seventh Circuit Court of Appeals that such fact, even

if it existed, as these petitioners contend, amounted to a material fact. These petitioners have now expanded on their deviation from the record in this cause and now boldly assert that the fact they first desired to controvert in the Court of Appeals is now the absolute truth of the matter and also is sufficient grounds for a reversal of the Court of Appeals and the District Court.

STATUTES, REGULATIONS AND LAW INVOLVED.

Respondents do not understand that this section was meant to encompass the case law necessarily involved in the determination, but, since petitioners have seen fit to set forth two cases they believe controlling, respondents must challenge the completeness of the case law so cited. To clearly understand the decisions of the Court of Appeals and District Court below petitioners should have cited to this Court as case law necessarily herein "involved" the cases of **Schubert v. Neyer** (1959), 12 O. O. 2d 231, 109 N. E. 2d 226; and **Crabbe v. Freeman** (1939), 81 Abs. 65, 160 N. E. 2d 583. Petitioners' failure to cite the above two cases to the Court fails to properly apprise this Court of the entire law involved, as the above two citations were utilized both by the District Court and the Court of Appeals in their respective opinions as setting forth the law of Ohio on the questions presented to them. Of course, if petitioners are only required to cite the authorities they believe helpful to them, their omissions of the above two cases is more understandable.

STATEMENT OF THE CASE.

Herein, petitioners set out several points allegedly omitted from the opinion of the Court of Appeals that petitioners believe important enough to warrant a dif-

ferent result if they had been included. Respondents will take these matters up in the order they are found in petitioners' brief.

Petitioners' first point is that the Court of Appeals omitted facts showing that respondent Guthrie told petitioners' then attorney David Peters that, in his opinion, the case had some settlement value, that the company was going to be fair and reasonable and would work out a settlement if at all possible, but, that final medical reports were necessary before this could be done. These are the points that petitioners have alleged amount to fraud because this case was never, in fact, settled. These are the "other attendant circumstances" petitioners have referred to so often in their briefs and arguments below that should have been held, so they say, a valid basis for **inferring** fraudulent motives to these respondents. No cases have ever been cited by these petitioners that would so hold and although these respondents have attempted to aid petitioners by themselves searching for such cases their efforts have been equally unrewarding, and therefore, it can be presumed that no such cases exist. What petitioners apparently want this court to hold is that in any case where an insurance adjuster discusses the possibilities of settlement with an attorney for a minor, if settlement is not forthcoming on terms agreeable to the minor, a fraud has thereby been committed on him. This is not the law in Ohio, or Indiana, or anywhere else, except possibly in the minds of the attorneys for these petitioners.

The second point petitioners state should have been included in the opinion of the Court of Appeals is equally unavailing to their position that these respondents have been guilty of fraudulent conduct, as all it alleges against these respondents is that Mr. Guthrie did **not** indicate to Mr. Peters that he **would not** disclose knowledge to

Mr. Peters of the opening of a Fett estate, if he learned such an estate had been opened. In understanding just what occurred between Mr. Peters and Mr. Guthrie at the time of the conversation referred to in this point of petitioners' statement of the case, respondents would set out below the verbatim sworn testimony of petitioners' then attorney, David Peters, so that his own words can be examined. This examination will reveal that Mr. Guthrie **made no promise** to Mr. Peters to advise him of any knowledge which he might subsequently obtain, and, even more importantly, it will clearly disclose that Mr. Peters **did not rely** on Mr. Guthrie to give him this information. Here follows a direct quotation from the sworn deposition of David Peters:

> "I stated that if I learned an estate was opened in Ohio I would communicate with him (Guthrie) and that if he learned of an estate being opened in Ohio I would like to have him advise me that such procedure had taken place. On that occasion we both concluded that as far as we knew Fett had no assets and he had no estate" (original record below pages 232, 233).

Upon the above request of these petitioners' own then attorney, David Peters, has been built the entire case of petitioners against respondents, based upon our allegedly fraudulent conduct in not keeping the promise petitioners say the above quotation shows was made, to inform Mr. Peters if and when knowledge of the opening of an estate was obtained. First, it is clear that no such promise was ever made, second, the above quotation clearly shows that Mr. Peters **did not intend to rely** upon Mr. Guthrie to inform him of the opening of any estate **as he expressed his own intention to also check into this matter by his statement that he would inform Guthrie if he (Peters) learned of such an opening of an estate.** For

these reasons, respondents are honestly amazed at the persistence of these petitioners in alleging, time and again, that Mr. Guthrie somehow bound himself to see to it that Mr. Peters learned of such an estate, and, further, that even though he attempted to so inform Mr. Peters on one occasion, since his attempt was apparently unsuccessful, although this was unknown to him, that he has still committed a fraud by not subsequently ascertaining that the information conveyed to Mr. Peters' secretary actually reached Mr. Peters!

Points 3 and 4 do not even purport to relate to any communications concerning the opening of the Fett estate between respondents and petitioners and are not significant to the decision of the Court of Appeals or the court below. Therefore, respondents will not burden the Court by discussing them here.

Point 5 warrants a discussion, not upon its merits, but upon its propriety in a brief such as this. What petitioners are attempting to do in this section is to say that they might hold back what proof they have on points in controversy until the time of trial and successfully refute a motion for summary judgment by the mere statement that they intend to offer proof in opposition to respondents' affidavits at the time of trial. This petitioners cannot do. It has been held that if the moving party, by affidavit or otherwise, presents material which would require a directed verdict in his favor, if presented at trial, then he is entitled to a summary judgment, unless the opposing party either shows that opposing affidavits are then unavailable to him, or, comes forward with some materials, by affidavit or otherwise showing a triable issue of material fact still existing. See **Foster v. General Motors Corporation** (Ct. of Appeals, Seventh Circuit, 1951), 191 F. 2d 907; **Wilkinson v. Powell** (Ct. of Appeals, Fifth Circuit, 1945), 149 F. 2d 335, and **Moore's**

Federal Practice, Second Edition, Volume 6, Section 56.11 (3), and the numerous cases cited therein.

When respondents filed their motion for summary judgment in the District Court below they accompanied said motion with the affidavit of Mr. J. B. Guthrie, wherein he stated, under oath, that he telephoned David Peters' office on October 3, 1958, and informed his secretary that an estate had been opened for Mr. Fett. This motion for summary judgment was filed on August 30, 1962, and the summary judgment was entered on November 28, 1962; during all of which time these petitioners failed to supply evidence, by affidavit or otherwise, that in any way disputed or challenged the sworn statement of Mr. Guthrie. Petitioners first challenged this affidavit in their brief on appeal to the Seventh Circuit. They did so at that time by going outside the record and making a statement as follows:

> "Appellants have been told that neither of the secretaries working for Peters during October, 1958, have any recollection of receiving any message from anyone that Fett's estate had been opened in an Ohio Court on October 3, 1958, or any other date." (Page 30 of Petitioners' [then appellants'] original brief on appeal to the Seventh Circuit Court of Appeals.)

Petitioners here say to this Honorable Court that they are presenting this petition to secure justice and fair play for their clients. Respondents are entitled to the same from petitioners. If it be a fact that petitioners' counsel have been told by the then secretaries for attorney David Peters that they had no recollection of receiving the call from Mr. Guthrie, this evidence should have been presented to the District Court in opposition to the motion for summary judgment. It is submitted that no such evidence was presented as Mr. Peters' secretaries **have no such recollection**.

Petitioners were forced to resort to this hearsay that comes from outside the record, in the Appellate Court, after they realized how weak their position actually was. Petitioners have gone even further in this brief respondents are here answering, in that, after making the "statement of the case" containing the allegation above referred to, petitioners spend the balance of their brief **assuming** Mr. Guthrie swore falsely and **base their entire charge of fraud upon their own above-mentioned "evidence" not found in the record**, if it be admitted, for purposes of argument, that Mr. Peters' secretaries had no such recollection, and the petitioners are here honestly reporting what these secretaries told them, **this evidence now comes too late.**

HOW QUESTIONS FOR REVIEW ARE PRESENTED.

Respondents have no dispute with this section of petitioners' brief.

REASONS FOR ALLOWANCES OF THE WRIT.

Respondents join with petitioners in apologizing for taking up this Honorable Court's time by this petition and our regret is more sincere because of petitioners' attempts to twist the issues to give this Court jurisdiction to allow the writ.

Petitioners state two reasons for the allowance of the writ, namely, that the courts below have completely failed to recognize the law of Ohio applicable to the facts of this case, and that summary judgment has been improperly utilized to deny to them a jury trial, since genuine issues of material fact still exist.

Petitioners discuss their second reason first, and, therefore, respondents will answer in the same order. The material fact that is still allegedly existing in this cause ap

parently is whether or not Mr. Guthrie made the phone call to Mr. Peters informing him of the opening of the Fett estate. As has been pointed out above, Mr. Guthrie's affidavit stood unchallenged in the District Court, **although the record therein clearly shows that these petitioners were given additional time on October 8, 1962, by the District Court to file additional affidavits in opposition to respondents' motion.** Petitioners filed nothing contradicting Mr. Guthrie's affidavit although seven (7) weeks passed between the time of their request and the time the District Court entered summary judgment in favor of these respondents. Respondents are amazed that these petitioners after asking for, and being given, time, which they failed to utilize to file affidavits in opposition, were able to place the following statement in their brief to this Honorable Court:

> "At the very least the District Court should have, upon the facts of record, given petitioners as plaintiffs reasonable time in which to produce clarifying evidence" (Petitioners' brief page 8).

Petitioners had the time they now say the District Court refused to give them. As pointed out above, nothing was filed, by way of affidavit or otherwise, in opposition to Mr. Guthrie's affidavit, and this was for the simple reason that Mr. Guthrie spoke the **truth.**

The cases cited above, to-wit, **Wilkinson v. Powell** (Ct. of Appeals, Fifth Circuit, 1945), 149 F. 2d 335, **Foster v. General Motors Corporation** (Ct. of Appeals, Seventh Circuit, 1951), 191 F. 2d 907, and the **many, many** cases found in the footnotes to the section of **Moore's Federal Practice**, hereinabove cited, clearly show that these petitioners were required to, in some way, refute or challenge the affidavits accompanying respondents' motion for summary judgment and could not hold back their evidence until the time of trial. Summary judgment procedures were designed for

cases such as this where no one disputes the facts in the District Court. Now, as an afterthought, these petitioners find they must dispute the facts to maintain their standing in court and they, therefore, must go outside the record and resort to matters outside the record which they made no attempt to place in the record when they were given the opportunity to do so by the District Court.

This case has already proceeded through two courts with all parties agreeing that the law of the State of Ohio controls. It is, therefore, somewhat surprising to these respondents to find such a great portion of petitioners' brief devoted to a quotation from Mr. Justice Holmes' book, **The Common Law.** It appears to be routine procedure for these petitioners to cite inapplicable quotations from eminent jurists in an attempt to convince one reviewing court or another of their position. In the Court of Appeals, these petitioners (then appellants) utilized the words of Mr. Justice Cardozo which, though eloquent, were inapplicable. Here petitioners' lengthy quotation from Mr. Justice Holmes, **The Common Law,** section on Fraud, Malice and Intent is likewise eloquent, but inapplicable. Petitioners predicate their attempted analogy of the case at bar to matters discussed in the above volume by Mr. Justice Holmes by stating that the "gravamen" of their complaint was the concealment of the opening of the estate by Mr. Guthrie. The evidence in the District Court was undisputed that not only did Mr. Guthrie **fail to conceal this fact** but he **communicated** this fact to Mr. Peters' office help. Further, and even more important to the determination of this question, is the fact that **Mr. Peters did not rely** on Mr. Guthrie to supply him with this information. This was pointed out in the direct quotation from the deposition of Mr. Peters set out above. **Reliance is an element of an action for fraud and deceit in Ohio as well as in all other jurisdictions.** See **Crabbe v.**

Freeman, 160 N. E. 2d 583 at page 585. It is noteworthy that the above Ohio case is not mentioned in petitioners' brief to this court.

Although these respondents are certain that the quotation from **The Common Law** does not aid these petitioners, some portions as set forth in petitioners' brief are quite helpful to this court in deciding the questions actually presented herein. Respondents would refer this court to page 12 of petitioners' brief wherein they quote from page 137 of **The Common Law.** Mr. Justice Holmes stated as some of the elements of deceit, as follows:

> ". . . Third, known facts sufficient to warrant the expectations or suggest the probability that the other party will act on the statement . . . Fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the matter of the statement must be such as would not warrant belief according to the ordinary course of human experience . . ."

Applying these general principles to the facts herein it should first be mentioned that there was no "statement" made to Mr. Peters at any time by Mr. Guthrie. Secondly, at the time Mr. Peters asked Mr. Guthrie to inform him if he learned of an opening of an estate it is admitted that there was no knowledge of the estate already being open by Mr. Guthrie at that time. **Therefore, the fraudulent intent suggested by this element could not possibly have been present.**

Mr. Justice Holmes states as a further ground that the falsehood of the statement must be known to the party uttering the statement or the utterance must be made recklessly. As was pointed out above, no "statement" was ever made by Mr. Guthrie nor was he then possessed of knowledge that could have made his silent assent, if such be the fact, knowingly false.

Petitioners then move on to a discussion of various Ohio cases they say are applicable to the case at bar.

What appellants have apparently never been able to understand is that most states, including Ohio, make a broad distinction between positive statements of fact uttered by a person and mere silence, in making the determination as to what conduct amounts to fraud. Every case cited from the State of Ohio, with the exception of **Schubert v. Neyer** (1959), 12 O. O. 2d 231, 165 N. E. 2d 226, were cases involving **utterances** of false statements. These cases have no applicability here. As petitioners state, **the gravamen of their action is based upon the silence of Mr. Guthrie** in not informing Mr. Peters that an estate had been opened for Mr. Fett after he learned of this fact. Although Mr. Guthrie did inform Mr. Peters, we will let that fact pass for the moment. To fairly present the issues to this Court as to what was actually decided by the Court of Appeals for the Seventh Circuit, petitioners should have set forth the following language from **Schubert v. Neyer**, found on pages 231 and 232:

> "'As a general rule' says 23 Am. Jur. 852, 'to constitute fraud by concealment or suppression of the truth there must be something more than mere silence or a mere failure to disclose known facts.' Such was also the holding in paragraph 4 of the syllabus in **Copper Process Co. v. Chicago Bonding and Insurance Co.**, 3 Cir., 262 F. 66, 67, 8 A. L. R. 1477 as follows: 'as a general rule, to constitute fraud by concealment or suppression of truth, there must be something more than mere silence; that is, there must be some occasion which imposes on one person the legal duty to speak in order that he may be placed on an equal footing, in which case failure to state a material fact is equivalent to a concealment, and amounts to fraud equally with affirmative falsehood.'

> Furthermore, 'where there is no obligation to speak, silence cannot be termed suppression and is not a fraud.' (23 Am. Jur. 852.)"

This distinction between an affirmative false representation and silence was recognized in some of the cases cited by petitioners to the Court of Appeals below with certain of petitioners' cases pointing out this distinction in clear language. Somehow, this distinction continues to escape these petitioners. It should be noted here in passing, that the District Court as well as the Court of Appeals, also held that Mr. Guthrie and Mr. Peters were parties dealing at arms' length from each other and that the circumstances present did not impose the obligation or duty upon Mr. Guthrie to speak. Both of the opinions below thereby demonstrate that under the authority of **Schubert v. Neyer**, supra, **it made absolutely no difference whether Mr. Guthrie did, in fact, communicate his knowledge of the opening of the estate to Mr. Peters since this above mentioned case made it clear that there was no duty imposed upon Mr. Guthrie to so communicate.** Therefore, it follows that the fact petitioners allege is still disputed could not, in any event, be a fact, **material** to the determination, made by either the District Court or the Court of Appeals. It is to be remembered that summary judgment is proper when there is no dispute of the **material facts**, regardless of the existence of others facts still in dispute. See Rule 56 of the Federal Rules of Civil Procedure.

Petitioners, throughout their briefs both here and in the Courts below, have treated the fact, allegedly concealed by Mr. Guthrie, as being something peculiarly within his knowledge and unavailable to all others. When it is remembered that the fact Mr. Guthrie is charged with concealing was that an estate had been opened in the County Court in Ohio for Mr. John S. Fett, the charge of concealment can be seen in its true light, to-wit, **that**

Mr. Guthrie is being charged with concealing facts that are a matter of public record! Such facts are discoverable by the exercise of ordinary diligence on the part of any attorney with only the most basic knowledge of probate practice. From Mr. Peters' office in Fort Wayne, a fifty-cent phone call to the Clerk of the County Court across the state line in Ohio would have given him the information Mr. Guthrie had supposedly been concealing. On this very point the above cited case of **Schubert v. Neyer** has this to say:

> "In 24 Ohio Jur. (2d) 683, it is said that: 'It is generally held that mere silence does not constitute fraud where it relates to particular facts and matters of such a nature as to be equally open to common observation or visible to the eye where such facts are discoverable by the exercise of ordinary diligence.'"

Schubert v. Neyer (1959), 12 O. O. 2d 231, 109 N. E. 2d 226, page 229.

On pages 230 and 231 of this same opinion the Court further states:

> ". . . And Kerr on Fraud and Mistake (5th Edition by Sidney Edward Williams 1920) has this to say in the matter. 'The law requires men in their dealings with each other to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not to close their eyes to the means of information which are accessible to them: Vigilantibus, non dormientibus, jura subveniunt. If parties are at arms' length either of them may remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. . . .'"

The above was the language pointed out to the Court of Appeals by respondents as representing the law of Ohio on the issue of whether silence on a given occasion amounts to fraud. Petitioners, by omitting this language from their petition, intentionally attempt to misstate the facts and law of this case, and then go on to say that the Court of Appeals decided this case contrary to the law of Ohio! It is too easily seen by the above quotations that the Court of Appeals and the District Court decided this case **directly under the authority of cases from the State of Ohio** such as **Schubert v. Neyer**, supra, to spend any more time refuting the ridiculous position of these petitioners.

As previously mentioned, for reasons of their own, these petitioners have entirely omitted from their brief any reference to the case of **Crabbe v. Freeman** (1959), 81 Abs. 65, 160 N. E. 2d 583. This case is quite pertinent here as it defines the five elements of fraud necessary for such a determination under the law of Ohio. Petitioners were quick to point our that they were alleging fraud as the basis of their action against these respondents, yet, by ignoring the case from Ohio that sets forth the elements of fraud under Ohio Law these petitioners are assuming a naiveté on the part of these respondents and this Court that does not exist. It would have been far more appropriate for these petitioners to set forth these elements of fraud and then attempt to apply the facts of the case at bar to show that these elements are present. However, since the undisputed facts will not support a finding of fraud under Ohio Law, petitioners chose to ignore these requirements in presenting their position to this court. For the enlightenment of all concerned, and most particularly the petitioners, respondents will hereinafter set forth the elements necessary to a determination of fraud based upon Ohio Law. **Crabbe v. Freeman** defined these elements on page 585 of the Northeastern Reporter Opinion as follows:

"1. A false representation: actual or implied, or the concealment of a matter of fact, material to the transaction, made falsely.

2. Knowledge of the falsity—or statement made with such utter disregard and recklessness that knowledge is inferred.

3. Intent to mislead another into relying upon the representation.

4. **Reliance—with a right to rely.**

5. Injury as a consequence of that reliance.

All of these elements must be present if actionable fraud is to be found. The absence of one element is fatal to recovery." (Emphasis supplied.)

Again respondents would call this Honorable Court's attention to the holdings of the courts below that in the case at bar there was, first, **no reliance**, and secondly, **there was no right to rely**. Therefore, even assuming a false representation or a concealment of something Mr. Guthrie had a duty to communicate with such concealment being intentionally done with an intent to mislead Mr. Peters and with that result ultimately being accomplished, **petitioners would still not have established a case against these respondents under the Law of Ohio**. Mr. Peters' statement that he would tell Mr. Guthrie if he learned of an estate being opened, and would like Mr. Guthrie to tell him if he so learned, **has been held on at least two separate occasions in the courts below to conclusively show that Mr. Peters did not, in fact, rely upon Mr. Guthrie to inform him of this fact**. Further, under the authority of **Schubert v. Neyer** and **Crabbe v. Freeman**, supra, since the concealment, if there was any, was of a matter equally accessible to both parties, with both parties dealing with each other at arms' length

and there could not, in law, exist any right to rely upon the other party, under these circumstances. As was said in **Crabbe v. Freeman**, "All of these elements must be present if actionable fraud is to be found." All of these elements **were not present** under the undisputed facts in this case. Certainly, petitioners will not now contend that Mr. Peters' sworn statement did not tell the whole story or was not true when he explained the circumstances surrounding his request that Mr. Guthrie inform him, if and when he learned of the opening of an estate. The circumstances surrounding this conversation between Mr. Guthrie and Mr. Peters have never been disputed.

After themselves omitting any reference to the above-mentioned case of **Crabbe v. Freeman**, supra, and after attempting to avoid the language of **Schubert v. Neyer**, supra, as set forth above; both of which cases are clearly, directly and definitely in point here, petitioners state that it was "inappropriate" for the Court of Appeals to cite their own case of **Sigler v. All State Insurance Company** (Ct. of Appeals, Seventh Circuit, 1963), 319 F. 2d 418, as "that case dealt with misrepresentations of foreign law, not matters of fact necessary to give foreign law effect" (Petitioners' brief, page 16). The validity of this subtle distinction, attempted to be drawn by petitioners, escapes respondents. In the **Sigler** case an insurance adjuster had made a positive representation that the Statute of Limitations concerning a claim was of two years' duration when in fact he **knew** it was of only one year's duration. He made this representation direct to the claimant, yet, the Court of Appeals held that since claimants were represented by an attorney and since the representation was of a matter that could easily have been ascertained, as to its truth or falsity, by claimant's attorney there was no **right to rely** upon such representation and therefore a case of fraud had not been made out.

This case is even stronger than the case at bar as here there is no claim that any positive misrepresentations were ever made. It is admitted that the **Sigler** case did not arise under, or was not governed by, the laws of the State of Ohio and, respondents are not attempting to state that it is controlling here. What is being attempted is to explain to these petitioners that the **Sigler** case shows that **reliance, with a right to rely** is the requirement, or element, of actionable fraud recognized in many jurisdictions.

Whether the **Sigler** case is in conflict with a District Court opinion from the State of New York it is not an issue here.

Petitioners close their brief with a plea that their clients ought not be deprived of the substance of their cause of action by the wily conduct of respondent Guthrie. Petitioners even go so far as to demand punitive damages as well as compensatory damages for the alleged deprivation. As has been shown, petitioners' plea of fraud is not supported by the record and if anyone has deprived these petitioners of their cause of action it was their then attorney, David Peters, who, by the way, bought his way out of this litigation for a consideration. (See appellants' original brief page 11.) Petitioners' unfounded and unsupported charges of fraud have a hollow ring when the facts of this case are examined. Petitioners' petition for Writ of Certiorari is likewise seen to be without substance when their asserted grounds for the issuance of the writ are examined in the light of the facts and applicable case law from the State of Ohio. These respondents have been forced through one unwarranted appeal already, and have now been forced to respond to petitioners' request for this writ. Furthermore, this petition alleges no proper ground under Rule 19 of this Court for such review when petitioners' "issues" are closely examined. Although peti

tioners demand punitive damages, respondents would state that punitive costs would be more appropriate relief and should be awarded to respondent since it has so clearly been shown that petitioners have gone outside the record to show "evidence" of respondents' alleged fraud and have intentionally misstated the issues decided below in an attempt to put this matter before this Honorable Court. It is respectfully and sincerely submitted by these respondents that this petition by petitioners is actually another attempt to force a settlement in this cause. Petitioners have tried this before and they are to fail in this attempt also, as they have failed in all previous ones, for the reason that there is here in issue, at least by implication and innuendo, the moral character of Mr. Guthrie which cannot, and will not, be compromised.

By reason of what has hereinabove been set forth showing the facts as they truly are, and under the applicable case law of the State of Ohio set forth in the body of this brief, it is respectfully submitted that this petition for the Writ of Certiorari should be and must be denied

Respectfully submitted,

HUNT, SUEDHOFF & WILKS.

By LEIGH L. HUNT.

WILLIAM E. BORROR